Director of Forest Sarawak & Ors v Nicholas Mujah ak Ason & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-30–06 OF 2017(Q)
AHMAD MAAROP PCA, ZAHARAH IBRAHIM CJ (MALAYA), ALIZATUL KHAIR, ABANG ISKANDAR AND NALLINI PATHMANATHAN FCJJ
18 OCTOBER 2019

Land Law — Trespass — Interference with possessory rights — Ibans occupying area converted into forest reserve were given rights to live off the land subject to conditions imposed by state — Whether despite granting of the rights the state still retained control over management of reserves — Whether granting of rights did not mean the Ibans could claim they acquired native customary rights to manner in which they lived off the land — Whether the Ibans were entitled to quiet and peaceful enjoyment of their admitted rights within entire area of the reserve — Whether timber-logging company's act of building rail line across the reserve constituted trespass for which the Ibans were entitled to be paid damages as compensation

The Sarawak government had created the Bukit Bediri Forest Reserve and proposed a communal forest named Stika to benefit the inhabitants of seven named longhouses of the Iban community. Government *gazette* notifications pertaining to the creation of the forest reserves gave rights to the longhouse residents to take produce from the forests for their own use, hunt game and catch fish and continue to exercise their age-old customary practice of *temuda*. The granted rights were subject to conditions, in that the inhabitants could not sell or barter the produce they took from the forests (the quantity of produce removed and the place and manner in which it was done was subject to the control of the Conservator of Forests), hunting and fishing had to be carried out subject to the laws of Sarawak and the right to temuda was on condition no new virgin forest land was cleared for such practice. Twenty named persons in the Bukit Bediri Forest Reserve were given the right to retain possession of certain rubber and pepper gardens they had cultivated before the forest reserve was created but they were precluded from planting new areas under the crops. A dispute arose when a company, to whom the authorities had granted a timber logging licence, and its contractor, built a rail track cutting across the two forest reserves. The respondents, who were descendants of Ibans who had been occupying the Bukit Bediri forest area for ages, claimed that the rail track constituted a trespass over their lands and sued the appellants, the timber company and its contractor for damages. The High Court allowed the claim holding that the respondents had acquired native customary rights ('NCR') to

the lands in both forest reserves, that the defendants had committed trespass by building the rail line as it interfered with the respondents' livelihood and, accordingly, the defendants were jointly and severally liable to pay damages to the respondents for the trespass. The Court of Appeal ('COA') affirmed the High Court's decision and also found that the admitted rights granted to the respondents under the *gazette* notifications were consistent with their customary practices of *pulau galau* and *pemakai menoa*. In their instant appeal against the COA's decision, the appellants argued that the courts below were wrong to hold that the respondents had acquired NCR over the lands in the two forest reserves as such a finding negated the state's power and control over how the reserves were managed and maintained. The questions before the Federal Court were whether the state still retained control over the forest reserves in question and whether the courts below were right to find that the appellants were liable to pay damages to the respondents for trespass.

Held:

(1) In light of the Federal Court's decision in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281, the respondents did not acquire any NCR in respect of the practices of pulau galau and pemakai menoa in both the forest reserves. Hence, that part of the decisions of the courts below was set aside. *TR Sandah*'s case, by majority, decided that the aforesaid practices among the Ibans, although customary, were not recognised under the laws of Sarawak. As a result, the position taken by the respondents to premise their claim for NCR for those rights, which were usufructuary in nature, could not stand. Even under *Gazette* Notification No 760, the respondents were only entitled to forage for food and to harvest the forest produce subject to express conditions; they were not entitled to create NCR over the land in the two reserves (see paras 20–21, 28 & 76).

(2) The state retained control over the forest reserves and its produce and things found therein pursuant to the Sarawak Forest Ordinances and not merely because of the conditions attached to the admitted rights granted to the inhabitants in the Second Schedule of *Gazette* Notification No 760. The nature and extent of the state's control only related to the protection and management of the forests and regulation over the taking of forest produce. It did not extend to the infringement of the admitted rights, communal and/or usufructuary rights exercisable within the forest reserve area as provided for in the Second Schedule. Hence, the nature of the control retained by the state was circumscribed by the admitted rights and conditions enumerated in the Second Schedule of *Gazette* Notification No 760 (see paras 45 & 67–68).

(3) Although the state retained control over the forest reserve, it failed to exercise control within the scheme stipulated under s 12(2) of the Forest Ordinance 1934. The COA was right in stating that although approval was given for the construction of the rail line, the Director of Forests ('DOF') did not issue any direction or order that the exercise of the respondents' subsisting rights be limited. In other words, there was no evidence to show that upon issuance of the timber licence and/or approval of the rail line, the rights of the seven longhouses and the 20 named persons were subjected to any additional conditions imposed by the DOF apart from those already expressed in the Second Schedule of *Gazette* Notification No 760 (see para 70).

(4) As no local limits were specified for the exercise of the respondents' admitted rights within the forest reserve, and so long as they did not breach any of the conditions attached, they were entitled to quiet and peaceful enjoyment of their admitted rights within the entire forest reserve area. Hence, the timber-logging company's construction of the rail line across the Bukit Bediri and Stika forests without the respondents' permission and without any corresponding steps taken by the state to alter the conditions appearing in the Second Schedule or to limit the exercise of the respondents' admitted rights, was clearly an act of trespass that interfered with the respondents' rights to the use of the lands and the respondents were thereby entitled to damages as compensation for the trespass. The courts below were not plainly wrong in their findings of facts on the issue of the trespass (see paras 66, 69 & 71–74).

[Bahasa Malaysia summary

Kerajaan Sarawak telah mewujudkan Hutan Simpan Bukit Bediri dan mencadangkan hutan komunal bernama Stika untuk memberi manfaat kepada penduduk tujuh rumah panjang masyarakat Iban yang telah dinamakan. Pemberitahuan *warta* kerajaan mengenai kewujudan rizab hutan tersebut memberi hak kepada penduduk rumah panjang untuk mengambil hasil dari hutan untuk kegunaan mereka sendiri, membuat buruan dan menangkap ikan dan terus menjalankan amalan adat lama temuda mereka. Hak yang diberikan adalah tertakluk kepada syarat-syarat, bahawa penduduk tidak boleh menjual atau menukar hasil yang mereka ambil dari hutan (kuantiti hasil dikeluarkan dan tempat dan cara yang dilakukannya adalah tertakluk kepada kawalan Konservator Hutan), memburu dan memancing perlu dijalankan tertakluk kepada undang-undang Sarawak dan hak untuk temuda adalah dengan syarat tiada tanah hutan dara baru dibersihkan untuk amalan sedemikian. Dua puluh orang yang dinamakan untuk Hutan Simpan Bukit Bediri diberi hak untuk mengekalkan pemilikan beberapa taman getah dan lada yang telah mereka usahakan sebelum rizab hutan diwujudkan tetapi mereka dihalang daripada menanam tanaman tersebut di kawasan baru. Pertikaian timbul apabila sebuah syarikat, yang pihak berkuasa telah

memberikan lesen pembalakan kayu, dan kontraktornya, membina landasan keretapi merentas dua rizab hutan itu. Responden, keturunan Iban yang menduduki kawasan hutan Bukit Bediri selama berabad-abad, mendakwa bahawa landasan keretapi itu merupakan pelanggaran terhadap tanah mereka dan menyaman perayu, syarikat kayu dan kontraktornya untuk ganti rugi. Mahkamah Tinggi membenarkan tuntutan dengan memutuskan bahawa responden telah memperoleh hak adat anak watan ('HAAW') ke tanah di kedua-dua hutan rizab tersebut, bahawa defendan telah melakukan pelanggaran menceroboh dengan membina landasan keretapi kerana ia mengganggu penghidupan responden dan, sewajarnya, defendan secara bersama dan berasingan bertanggungjawab untuk membayar ganti rugi kepada responden kerana pencerobohan itu. Mahkamah Rayuan ('MR') mengesahkan keputusan Mahkamah Tinggi dan juga mendapati bahawa hak-hak yang diberikan kepada responden-responden di bawah pemberitahuan *warta* itu adalah selaras dengan amalan adat mereka iaitu pulau galau dan pemakai menoa. Dalam rayuan mereka terhadap keputusan MR, perayu-perayu berhujah bahawa mahkamah bawahan terkhilaf apabila memutuskan bahawa responden-responden telah memperoleh HAAW atas tanah tersebut dalam dua hutan rizab itu kerana penemuan itu menafikan kuasa dan kawalan kerajaan negeri mengenai bagaimana rizab itu diuruskan dan diselenggarakan. Persoalan-persoalan di hadapan Mahkamah Persekutuan adalah sama ada kerajaan negeri masih mengekalkan kawalan ke atas hutan rizab tersebut yang dipersoalkan dan sama ada mahkamah bawahan adalah betul untuk mendapati bahawa perayu-perayu adalah bertanggungjawab untuk membayar ganti rugi kepada responden-responden kerana menceroboh.

Diputuskan:

(1) Berdasarkan keputusan Mahkamah Persekutuan dalam kes *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281, responden-responden tidak memperoleh apa-apa HAAW berkenaan amalan pulau galau dan pemakai menoa dalam kedua-dua hutan rizab. Oleh itu, sebahagian daripada keputusan mahkamah bawahan telah diketepikan. Kes *TR Sandah*, dengan majoriti, telah memutuskan bahawa amalan yang disebutkan di kalangan Iban, walaupun merupakan suatu adat, tidak diiktiraf di bawah undang-undang Sarawak. Akibatnya, kedudukan yang diambil oleh responden-responden untuk membuat tuntutan mereka berasaskan HAAW untuk hak-hak tersebut, yang bersifat *usufructuary*, tidak dapat dikekalkan. Malah di bawah Pemberitahuan *Warta* No 760, responden-responden hanya berhak untuk memakan makanan dan menuai hasil hutan tertakluk kepada syarat-syarat yang jelas; mereka tidak berhak untuk mewujudkan HAAW

ke atas tanah di kedua-dua rizab tersebut (lihat perenggan 20–21, 28 & 76). A

(2) Kerajaan negeri mengekalkan kawalan ke atas hutan rizab tersebut dan hasilnya dan benda yang dijumpai di dalamnya menurut Ordinan Hutan Sarawak dan bukan semata-mata kerana syarat-syarat yang terikat kepada hak-hak yang diterima yang diberikan kepada penduduk dalam Pemberitahuan *Warta* Kedua Bil 760. Sifat dan sejauh mana kawalan kerajaan negeri hanya berkaitan dengan perlindungan dan pengurusan hutan tersebut dan peraturan mengenai pengambilan hasil hutan. Ia tidak melampaui pelanggaran hak, hak komunal dan/atau hak *usufructuary* yang dibenarkan dalam kawasan hutan rizab seperti yang diperuntukkan dalam Jadual Kedua. Oleh itu, sifat kawalan yang dikekalkan oleh kerajaan negeri tersebut adalah terikat pada hak dan syarat yang dimasukkan dalam Jadual Kedua Pemberitahuan *Warta* No 760 (lihat perenggan 45 & 67–68). B C D

(3) Walaupun kerajaan negeri mengekalkan kawalan ke atas hutan rizab tersebut, ia gagal menjalankan kawalan dalam skim yang ditetapkan di bawah s 12(2) Ordinan Hutan 1934. MR adalah betul dalam menyatakan bahawa walaupun kelulusan diberikan untuk pembinaan landasan keretapi, Pengarah Hutan ('PH') tidak mengeluarkan apa-apa arahan atau perintah bahawa pelaksanaan hak sedia ada responden adalah terhad. Dalam erti kata lain, tiada bukti menunjukkan bahawa apabila dikeluarkannya lesen balak dan/atau kelulusan landasan keretapi, hak-hak tujuh rumah panjang dan 20 orang yang dinamakan itu tertakluk kepada sebarang syarat tambahan yang dikenakan oleh PH selain daripada yang dinyatakan dalam Pemberitahuan *Warta* Kedua Pemberitahuan 760 (lihat perenggan 70). E F

(4) Oleh kerana tiada had setempat yang ditentukan untuk menggunakan hak-hak yang diterima oleh responden-responden dalam hutan rizab itu, dan selagi mereka tidak melanggar apa-apa syarat yang dilampirkan, mereka berhak untuk menikmati kesenangan yang tenang dan damai terhadap hak-hak mereka yang diterima untuk seluruh hutan kawasan rizab itu. Oleh itu, pembinaan landasan keretapi syarikat pembalakan yang merentasi Bukit Katiliri dan hutan Stika tanpa kebenaran responden-responden dan tanpa langkah-langkah yang sama yang diambil oleh kerajaan negeri untuk mengubah syarat-syarat yang terdapat dalam Jadual Kedua atau untuk menghadkan pelaksanaan hak yang diakui responden-responden, jelas merupakan tindakan pencerobohan yang mengganggu hak responden-responden untuk penggunaan tanah itu dan responden-repsonden oleh demikian berhak untuk ganti rugi pampasan kerana pencerobohan itu. Mahkamah bawahan tidak salah dalam penemuan fakta mengenai isu pencerobohan itu (lihat perenggan 66, 69 & 71–74).] G H I

Cases referred to

Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281, FC (consd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Henderson v Foxworth Investments Ltd and another [2014] 1 WLR 2600, SC (refd)
Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyds Rep 403 (refd)
Sin Heap Lee — Marubeni Sdn Bhd v Yip Shou Shan [2005] 1 MLJ 515, CA (refd)
Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)
Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd [2019] 1 MLJ 1, FC (refd)
Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors [2016] 1 MLJ 200, FC (refd)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)
Watt (Or Thomas) v Thomas [1947] 1 All ER 582; [1947] AC 484, HL (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78(1)
Forests Ordinance 1934 s 12(2)
Interpretation Ordinance 1953 s 10(c)
Sarawak Forest Ordinance 1934 (Cap 31) ss 9, 12(2), 18, 21, 23, 62, Part IV
Sarawak Forest Ordinance 1953 (Cap 126) ss 9, 16
Sarawak Land Code s 5

Mohd Adzrul bin Adzlan (Emma bt Mohd Yusri with him) (State Attorney General's Chambers, Sarawak) for the appellant.
Joshua P Baru (Clarice Chan with him) (Baru Bian) for the respondent.

Abang Iskandar FCJ (delivering judgment of the court):

PRELIMINARY

[1] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as Justice Zaharah Ibrahim CJM has since retired. My learned brother Ahmad Haji Maarop PCA, my learned sister Justice Alizatul Khair Osman Khairuddin FCJ and my learned sister Justice Nallini

Pathmanathan FCJ had read this judgment in draft and all of them agreed that this judgment be our judgment.

BRIEF FACTS OF THE CASE

[2] The plaintiffs are all natives by race, ie Ibans from three different villages within the town of Simunjan, Sarawak.

[3] Hock Tong Hin Sawmill Co Bhd ('the first defendant') is a licensed timber company that was granted a concession area for the extraction of timber under license No T/5090 ('the said concession area').

[4] Roundtree Timber Sdn Bhd ('the second defendant') is the contractor of the first defendant in carrying out and/or felling and extracting merchantable timber logs including the felling and extracting the logs within the specified concession area.

[5] The plaintiffs claim that at all material times, they are the rightful owners, claimants, of a communal forest reserved land situated at/or along Sungai Sebangan, Simunjan, Sarawak.

[6] On or about January 2006, the plaintiffs discovered that the first and second defendants and/or their employees or agents or servants had trespassed their lands by building a railway track to carry out logging activities over part of their said lands causing some serious damage to the environment, namely loss of timber and polluting the river system.

[7] Sometime in February 2006, a complaint was lodged with the District Officer Simunjan on the encroachment of a logging activity within the said lands but no action was taken. The first and second defendants refused to negotiate with the plaintiffs on the ground that the plaintiffs have no right over the said land claimed by the plaintiffs.

[8] On 14 September 2006, the plaintiffs caused a physical blockage at the Bukit Bediri Forest Reserve to stop the felling and extracting of the timber therein.

[9] A police report was made by the plaintiffs on 9 November 2006 at Sebuyau Police Station, complaining of further encroachment by the first and second defendants.

[10] The plaintiffs also claimed that the boundary of the said concession area

had encroached onto their said lands and had disregarded the plaintiffs' rights and therefore bad in law and void.

[11] On 4 July 2007, this action was filed in the High Court ('the HC') sitting at kuching, wherein the plaintiffs claimed for declaratory reliefs in respect of the plaintiffs' native entitlement to the said area, including the constitutionality of the timber license. The plaintiffs also claimed for aggravated and exemplary damages to be paid for the alleged trespass to their land.

FINDINGS OF THE HIGH COURT

[12] Having heard the evidence adduced before her, the learned High Court judge ('the HCJ') had ruled in favour of the plaintiffs, and granted the plaintiffs the following terms, together with costs:

(a) the plaintiffs have inherited native customary rights ('NCR') over Bukit Bediri Forest Reserve and Stika Forest, the boundaries of which as delineated and shown in maps produced by the Forestry Department Sarawak and Land and Survey Department Sarawak appearing at pp 1–2 of exh D4;

(b) the construction of the rail line across these two forests constituted an encroachment and a trespass of the said land; and

(c) the defendants are jointly and severally liable to pay damages to be assessed by the deputy registrar, to the plaintiffs (except those from Kampung Stika who have been earlier compensated) for the said trespass.

[13] Dissatisfied with the decision of the HCJ, the third, fourth, and fifth defendants had appealed against the said decision to the Court of Appeal ('COA').

IN THE COURT OF APPEAL

[14] The COA, having heard submissions had unanimously found that there was no merit in the appeal and thus, dismissed it with costs. The decision of learned High Court judge was duly affirmed.

[15] In finding so, the learned COA judges were of the view that the Second Schedule of *Gazette* Notification No 760 ('the Second Schedule') expressly states that the forest reserve is constituted for the benefit of the permanent inhabitants of the seven longhouses stated therein. In addition, 20 persons are listed as persons that shall have the right to retain possession of rubber and pepper gardens planted prior to the constitution of the forest reserve. The rights, as stated in paras (a), (b) and (c) of the Second Schedule, are generally for

the inhabitants to take forest produce, hunt game and catch fish and to continue the exercise of rights over *temuda* already acquired prior to the constitution of the forest reserve, respectively. Those rights have been inherited by the plaintiffs. The encroachment and the logging activities of the timber companies have destroyed the plaintiffs' sources of livelihood, the destruction of their rubber gardens, farm land, old settlement sites with orchard gardens, burial grounds, sacred sites and valuable trees. The encroachment and logging activities had also caused erosion to the plaintiffs' land and polluted their rivers.

[16] The learned COA judges also found that there was no outright rejection of the establishment of the plaintiffs' NCR by foraging for food in the jungle. In any event, para (a) and (b) of the Second Schedule clearly provide for the plaintiffs to take timber, to hunt game and catch fish in the forest reserve, which was consistent with the plaintiffs' custom of *pulau galau* and *pemakai menoa*. There was no appealable error on the part of the HCJ in making the first order.

[17] In respect of trespass or encroachment by the reason of the construction of the rail line, the COA judges found that there was no appealable error on the part of the HCJ in her finding that the rail line had been built right across Stika Forest and had traversed part of the Bukit Bediri Forest Reserve. Notwithstanding that the rail line was built over swampy lands, the encroachment had interfered with the plaintiffs' livelihood as the plaintiffs could still carry out activities on and derived benefits from the swampy land. Furthermore, apart from the fact that approval was given for the construction of the rail line, there was no other evidence adduced to show that, pursuant to the approval, the third defendant had issued any direction or order that the exercise of the plaintiffs' subsisting rights be limited.

[18] Dissatisfied with the decision of the COA, the third to fifth defendants proceeded their appeal to the Federal Court. They were granted leave to appeal to this court on 17 May 2017 on the following questions of law:

(i) whether the COA's decision in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 that the rights of the native are confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent and nature of rights to land claimed under native customary rights in Sarawak;

(ii) whether the alleged practice of Iban to preserve an area of jungle or forest as 'pulau' for access for food, wild life and forest produce, give rise to exclusive rights to the land in the 'pulau';

(iii) whether the imposition of conditions within the Second Schedule of *Gazette* Notification No 760 entitles the state to retain control over areas

other than cleared land or 'temuda' within the Bukit Berdiri forest reserve; and

(iv) if the answer to question (iii) is in the affirmative, whether any NCR can be created within reserved land like forest reserve under the control of the state.

THIS APPEAL

[19] We heard this appeal on 18 March 2019. During his oral submissions, the learned state legal officer ('the SLO'), representing the third to fifth defendants in this appeal indicated to us that they were proceeding only on question of law captured as No (iii) namely:

> Whether the imposition of conditions within the Second Schedule of *Gazette* Notification No 760 entitles the State to retain control over areas other than cleared land or 'temuda' within Bukit Bediri Forest Reserve.

[20] It would be pertinent to however remind ourselves, that the other allowed questions have been, which had since been withdrawn by the third to fifth defendant at the eleventh hour. Of significance had been question (i) which relates to the question pertaining to the claimed NCR of *pulau galau* and *pemakai menoa.* But it is quite apparent that the answer to that question had been provided by the Federal Court in the case of *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281 ('the *TR Sandah* case') which by majority had decided that the above-named practices among the Ibans, although admittedly customary, are nevertheless not recognised under the law of Sarawak. Only the customary practice of *temuda*, or clearing of virgin forest jungles for cultivation is recognised and that has a cut-off date of 1 January 1958. It must be on that consideration, we would gather, that the questions that would have impact on that issue, had been withdrawn by the third to fifth defendants. There were no objections from the plaintiffs.

[21] As such, the net result of the decision of *TR Sandah* case on the claims of the plaintiffs must be that their claims for NCR for those rights which are usufructuary in nature, would have to fail. Indeed, in light of the decision in the *TR Sandah* case, albeit a split one, the position taken by the plaintiffs to premise their claim for NCR could not stand, which decide that the practices of *pulau galau* and *pemakai menoa*, though customary, are not recognised under the law of Sarawak.

[22] But, that would not completely dispose of this appeal for the simple

reason that the rights of the plaintiffs in this case were founded upon a conferment of statutory rights by the third to fifth defendants to the plaintiffs by the former constituting a forest reserve over the Bukit Bediri forest area. The Second Schedule that comes along with the *Gazette* Notification No 760 of the forest reserve at Bukit Bediri lists down the rights and privileges and the conditions imposed on their exercise within that forest reserve. It must be borne in mind that the conditions clearly and in no uncertain terms prohibited the creation of new *temuda*, even back in 1930's. No mention was made of *pulau galau* and *pemakai menoa* in the conditions. But the rights conferred to the plaintiffs, who were descendants of permanent residents of the Bukit Bediri forest area, appeared to be quite similar to those practices of *pulau galau* and *pemakai menoa*, to forage for food from the forest produce, by way of hunting for wild animals and by way of fishing in the rivers or streams which run within the forest reserve of Bukit Bediri. In that sense, therefore, the rights of the plaintiffs are statutorily created as distinguished from the claimed NCR practices which would emanate and be recognised, if at all, under the common law.

[23] Hence, the concern on the part of the third to fifth defendants from the decisions of the courts below, the state authority would appear to have lost all manner of control over the forest reserve at Bukit Bediri by it imposing conditions upon the rights conferred upon the plaintiffs, as appear in the Second Schedule. In other words, regardless of the true nature of the plaintiffs' rights in the forest reserve, the extent of the state government's control in the forest reserve remains a live issue. Thus, through question (iii), the third to fifth defendants were desirous of ascertaining whether the state still retained control over the forest reserve having imposed the conditions as it did.

[24] The answer to question (iii) will then be applied to the factual matrix as found by both the courts below to determine whether the defendants were correctly found liable for the tort of trespass. As such, two issues were germane before us, namely:

(a) whether the State retained control over the forest reserve ('the leave question (iii) issue'); and

(b) whether on the evidence as adduced before the HC, the finding by the HCJ, which was affirmed by the COA, that the defendants were liable for trespass, was justified.

[25] Reverting therefore to question (iii), the learned SLO submitted before us that the decisions of the HC, as well as that of the COA in favor of the plaintiffs, being the respondents in this appeal, having had acquired NCR over the entire Bukit Bediri Forest Reserve and Proposed Stika Communal Reserve, are in error. Such decisions were at odds with the provisions of the Sarawak

Forest Ordinance 1953 (Cap 126) ('the SFO 1953'), namely s 9. The effect of such decisions had taken away the controlling powers of the conservator and had rendered the provisions of the SFO 1953, in relation to the conservator's control over forest reserve, nugatory. That would, as further submitted by learned SLO, go against the presumption that the Legislature does nothing in vain. The case of *Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors* [2016] 1 MLJ 200 was cited in support thereof.

[26] It was submitted before us that s 9 of the SFO 1953 only grants limited rights or privileges over forest areas within the forest reserve. Activities such as foraging is still regulated and controlled by the conservator. If the plaintiffs had established customary rights over the entire forest reserve as decided by the COA, then this section would have the effect of impairing or abridging such powers of the state.

[27] For ease of reference, we reproduce s 9 of the SFO 1953, as below:

> 9(1) When a right is admitted or a privilege conceded in respect of forest produce within a forest proposed for reservation, the quantity and nature of such forest produce which may be taken or received shall be stated.
>
> (2) The exercise of any right or privilege shall be subject to the control of the Conservator and to such orders as he may make to regulate the local limits within which and the mode on which the right or privilege may be exercised.

[28] Looking at the *Gazette* Notification No 760, the plaintiffs were entitled to forage or harvest the forest produce in those areas subject to the express conditions, but they are not entitled to create NCR over the land in the two areas.

[29] So to answer question (iii) we need to have a look at the *Gazette* Notification No 760 for the Bukit Bediri Forest Reserve which was marked as exh D1 during the course of trial in the HC. We reproduce it below:

> No 760 — FORESTS ORDINANCE
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> Cap 31 In exercise of the powers conferred on him by section 12 of the Forests Ordinance, the Chief Secretary hereby constitutes, with effect from 1st June, 1952, the land enclosed within the boundaries described in the First Schedule hereto a Forest Reserve subject to the rights conceded and special conditions attached specified in the Second Schedule hereto.
>
> FIRST SCHEDULE
>
> Name: Bukit Bediri Forest Reserve.
>
> Division: First.
>
> District: Simunjan.

Area: 2,458 acres approximately.

Boundaries: Commencing from Land and Survey peg at the mouth of Sungei ljok the boundaries follow cut lines bearing 77° ` and distance 8510 links, 120° and 4120 links, 100° and 910 links, 160° and 1600 links, 249° and 6620 links, 159° and 3220 links, 189° and 6420 links, 200° and 1350 links, 252° and 1440 links, 244° 15' and 6680 links, 184° and 3740 links, 101° and 5400 links, 12T and 4020 links, 65° and 8470 links, 111° 15' and 4200 links, 131° and 3210 links to the mouth of Sungei Entangor. The boundary then follows the true right bank of Sungei Sebangan for approximately 8 miles downstream to the mouth of Sungei ljok the point of commencement.

Bearings and distances are approximate and the demarcated boundaries shall be deemed to be correct.

SECOND SCHEDULE

The Forest Reserve is constituted for the benefit of the permanent inhabitants of the following long houses, who shall have the rights:

(a) to take timber, poles, fuel, rattan and other climbers, bamboo, damar, fruit, honey, beeswax and ataps for their own domestic use and for boat-building but not for sale or barter, provided that the quantity of, and the place and manner of collection of such forest produce shall be subject to the control of the Conservator of Forests; and

(b) to hunt game and catch fish, provided the exercise of this right shall be subject to the provisions of the laws of Sarawak relating to hunting and fishing.

(c) to continue the exercise of rights over temuda already acquired prior to the constitution of the forest reserve on condition that no more virgin forest is felled.

All Sea-Dayaks under Penghulu Berong in the following long-houses:

1. Rumah Penghulu Berong.
2. Rumah Jenta.
3. Rumah Ranggu.
4. Rumah Anggat.
5. Rumah Apau.
6. Rumah Jap.
7. Rumah Mail.

In addition the following persons shall have the right to retain possession of rubber and pepper gardens as stated hereunder, planted prior to the constitution of the forest reserve on condition that no new planting is made.

	Name	Rubber garden	Pepper vine
1	Penghulu Berong	10 acres approx	300
2	Rangga anak Gindi	2 " "	—
3	Engkabang ak Bakol	2 " "	—
4	Koyol anak Beran	3 " "	—
5	Limbun anak Sadal	2 " "	—
6	Bakit anak Tukoh	2 " "	450
7	Tikong anak Janting	4 " "	-
8	Jayan anak Manggai	5 " "	400
9	Randi anak Ngon	4 " "	100
10	Leman anak Randong	3 " "	200
11	Chuat anak Koyol	4 " "	150
12	Layang anak Leman	4 " "	300
13	Bayang anak Tikong	2 " "	—
14	Subong anak Randong	2 " "	—
15	Jap anak Berong	—	200
16	Kawi anak Berong	—	200
17	Seman anak Gesi	—	350
18	Luchi anak Mawang	—	100
19	Bugon anak Gesi	—	150
20	Anchot anak Gesi	—	150

JH ELLIS,
Acting Chief Secretary

[30] We also now reproduce the proposed notification for Stika as follows:

PROPOSED STIKA COMMUNAL FOREST
(CF 4)
PROCLAIMATION
PROPOSAL TO CONSTITUTE A COMMUNAL FOREST

PROCLAIMATION by the Resident First Division, Sarawak, under section 41 of the Forest Ordinance, 1953.

To all persons concerned, notice is hereby given:

1. That it is proposed to constitute the area described in the Schedule hereto a Communal Forest under section 45 of the Forest Ordinance, 1953.

2. That all persons interested in the area described in the Schedule hereto, or in any produce thereof, are required to claim any right in or over any land within the said area, before the 30th August, 1961; that such claims must be made in writing to the District Officer at Simunjan; and that they must specify the nature of such right or claim.

SCHEDULE I

Name	:	Stika Communal Forest
Division	:	First
District	:	Lower Sadong
Area	:	4188 acres approximately

Boundaries: Commencing at Kuala Sungei Stika, the boundary follows the true right bank of Sungei Stika for approximately 7300 links, thence along od Sungei Stika for 256° for 6500 links; thence along the eastern cut-line boundary of the Sedili Forest Reserve for 16500 links meeting Kuala Sungei Blanga, thence along the true right bank of Sungei Sebangan upstream until the boundary reaches the mouth of Sungei Entangor. The boundary then follows a series of cut-lines bearing 311° for 3210 links; 291° 15' for 4200 links; 245° for 8470 links; 307° for 4020 links; 281° for 5400 links; 4° for 3740 links; 64°15' for 6680 links; 72° for 1440 links; 20° for 1350 links; go for 6420 links; 339° for 3220 links; 300° for 4120 links and 257° for 8510 links meeting the mouth of Sungei ljok; thence downstream along the true left bank of Sungei Sebangan back to the point (...)

Note: Bearings and distance are approximately only and the demarcated boundaries shall be considered correct.

SCHEDULE II

The Communal Forest is constituted for the benefit of the permanent inhabitants of the Long House listed below, who shall have the rights —

(a) to take forest produce for their own use, and not for sale or barter;
(2)

(b) to exercise rights in hunting and fishing over the area;

(c) to continue to farm in old 'temuda' and to maintain existing rubber and pepper gardens but no virgin forest shall be felled in the Communal Forest.

1. Rumah Penghulu Berong
2. Rumah Jenta
3. Rumah Ranggau
4. Rumah Anggat
5. Rumah Apau
6. Rumah Jap
7. Rumah Mail

Date 17 MAY 1961 .....

..... Resident, First Division

[31] The two forest reserves were created for the benefit of the permanent

residents of the two affected areas. Both areas were carved out as such, subject to the express conditions as stipulated therein. It was not an outright grant without any conditions. In other words, granted that the plaintiffs were lawfully in occupation in the respective forest reserves, they were there under licence with the state authority's permission to do things subject to conditions. In other words, they are persons in the contemplation of s 5 of the Sarawak Land Code ('the SLC'). The plaintiffs were recognised as licensees under clear provisions of the SLC, except of course, for the old *temuda* within the said two forest reserves.

[32] As such, the net effect of the two documents are, according to the third to fifth defendants as follows:

(a) that existing *temuda* is recognised and could be continuously worked on. There will be no creation of new *temuda* by felling trees in virgin forest within the demarcated areas;

(b) the permanent inhabitants of listed long houses were allowed to forage for food within the demarcated forests; and

(c) there was no total abdication of control of the usage of other activities by other persons within the demarcated forest areas.

In other words, learned SLO had urged this court to answer the leave question (iii) in the *affirmative*, meaning, that the state retain control over Bukit Bediri Forest Reserve.

[33] For the plaintiffs, in respect of the issue that had pertained to question No (iii) it was submitted that:

(a) from the plain reading of the *Gazette*, the Second Schedule does not in any manner of form give control of the land to the state. In fact, the Second Schedule does not restrict or limit the existence of the plaintiffs' rights, but only regulates how certain types of activities, which are being exercised over the acknowledged NCR are to be carried out. There is nothing according to learned counsel for the plaintiffs, in the Second Schedule that warrants the state to limit or regulate the nature and extent of the plaintiffs' rights; and

(b) that it would be paradoxical to conclude that the Second Schedule of the *Gazette* or the proposed Communal Forest *Gazette* would allow the nature and extent of the rights of the plaintiffs be regulated and limited by the said *Gazette* and the Forests Ordinance when the forests reserve itself were 'constituted for the benefit of the permanent inhabitants' of the longhouses named therein.

It is submitted that what the conditions only proposed to do is to ensure the manner the activities carried out by the inhabitants adhere to the laws of the state.

[34] Based on the above submissions, learned counsel for the plaintiffs had urged upon us to conclude that the question No (iii) be answered in the *negative*, namely that the state had not retained control or in other words, had lost control, and then to further rule that NCR of *pulau* and *menoa* can be created within a forest reserve.

OUR DELIBERATIONS AND FINDINGS

[35] Before proceeding further, it must be stated here that the applicable law ought to be the Sarawak Forest Ordinance 1934 ('the SFO 1934') (Cap 31), not the SFO 1953. This is because the Bukit Bediri forest reserve was constituted in 1952 and the *Gazette* Notification No 760 was issued under SFO 1934. The SFO 1934 was subsequently repealed and the SFO 1953 came into being. Despite such a situation, the applicable provisions must be those contained in the SFO 1934. Although SFO 1934 was repealed, the acquired rights are saved and preserved. Section 10(c) of the Interpretation Ordinance 1953 provides as follows:

> The repeal of any written law shall not —
>
> (a) ...
>
> (b) ...
>
> (c) affect any right, power, obligation, restriction or liability acquired, accrued, imposed or incurred under any written law so repealed;

[36] Indeed, the conditions set out in (a) and (b) in the Bukit Bediri Forest Reserve clearly subject the use of the reserve forest to the SFO 1934 and the Mining Ordinance, among others. The conditions regulating the rights to forage and hunt in the two reserve forests are statutorily based. The *gazette* remained in force, and was never *degazetted*. The state's control had remained intact and was never superseded by any acquisition or creation of NCR as claimed by the plaintiff. The interplay between the exercise of the right and the control by the Director of Forestry ('DOF') was captured under s 12(2) of the SFO 1934. The control by the state via the DOF was clearly retained, as could be seen in the various indicia of such elements of control, albeit it being one which is not absolute.

[37] By way of reiteration, suffice to state here that since the applicable law is the SFO 1934, the continued operation of the Bukit Bediri forest reserve must be governed by law as it then stood when it was constituted and the terms peculiar to its constitution in the Second Schedule. In that regards, therefore, s 12(2) of the SFO 1934 is relevant for our consideration.

[38] Section 12(2) of the SFO 1934 provides as follows:

FORESTS

12(1) When the period fixed under section 5(3) has elapsed and all objections and claims, if any, have been disposed of and all lands, if any, to be included in the forest proposed for reservation have been acquired by the Chief Secretary under section 10, the Chief Secretary shall publish in the Government Gazette a notification which shall —

(i) specify the limits of the forest it is intended to reserve;

(ii) declare the same to be reserved from the date fixed by such notification;

(iii) state the rights admitted and privileges conceded in respect of the said forest; and

(iv) state the special conditions, if any, governing the reservation thereof.

(2) From the date so fixed, such forest shall be a forest reserve and shall, together with all the produce thereof and things found therein, be deemed to be the property of the Government, and shall be maintained and controlled by the Director of Forestry, subject to the rights, privileges, and conditions, if any, stated in such notification.

[39] This would invariably include the land, the trees, the forest produce and the fishes in the swampy areas that may exist in such a forest. In that regard, the use of the word 'things' in that sub-section clearly serves its purpose. But what would follow is at the centre of our present discourse. It goes on to provide that such forest shall be controlled and maintained by the DOF, subject to the rights, privileges and conditions, if any, stated in such notification.

[40] Nevertheless having said that, as alluded to by us earlier, the control of the state over the forest reserve may not be absolute. It would depend on how the conditions that are attached to the forest reserve are being couched. We think that the learned SLO realised this. Thus, the remaining question that is left for us to answer is the extent to which the State retained, if at all, control over the forest reserve at Bukit Bediri.

[41] In this case, the Notification No 760 as published in the *gazette*, was never altered, modified or deleted by any subsequent valid notification in the *gazette*. Hence, the Notification No 760 remains as a valid document.

CONTROL AND THE MEANING OF THE ATTACHED CONDITIONS

[42] To recap, as stated in the Second Schedule in the *Gazette* Notification No 760 the permanent inhabitants had the right to the use and taking of the forest produce as in para (a), to hunt game and catch fish as in para (b) and to *temuda* as in para (c). Specific individuals were also acknowledged of the rights

to retain possession of rubber and pepper gardens planted prior to the constitution of the forest reserve.

[43] However, the exercise of the admitted rights within the Bukit Bediri Forest Reserve is tied with the following conditions:

(a) the prohibition of sale or barter in the taking and collection of natural resources which are for domestic use and for boat building only. Accordingly, the quantity, manner and place of collection be subject to the control of the Conservator of Forests;

(b) the hunting and fishing are subject to the laws relating to such activities;

(c) the prohibition of felling of new virgin forest; and

(d) the prohibition of planting of new rubber and pepper gardens.

[44] Paragraph (a) concerns the exercise of rights in respect of forest produce within a forest reserve. This is governed specifically under s 9 of the SFO 1934 which states as follows:

> Section 9 —
>
> (1) When a right is admitted or a privilege conceded in respect of forest produce within a forest proposed for reservation of a forest reserve, the quantity and nature of such forest produce which may be taken or received shall be stated.
>
> (2) The exercise of such right or privilege shall be subject to the control of the Director of Forestry, and to such orders as he may make to regulate the local limits within which, and the mode in which, such forest produce may be taken within the forest reserve.

[45] Clearly, s 9 of the Ordinance mandated not only the statement of quantity and nature of forest produce that may be taken but also confined the exercise of such rights to the control of the DOF who shall regulate the local limits and the mode of taking the forest produce within the forest reserve.

[46] In this respect, it is pertinent to state here that any failure of the right holder to submit to such control or to abide by any order made under this provision may result in the annulment of any such right either permanently or for a stated period. This may be undertaken by the Chief Secretary after such inquiry as may be deemed necessary through a notification in the government *gazette* (s 15(b)).

[47] By comparison, we must also state that even in Cap 126, s 16 provides that the exercise of the subsisting rights shall be subject to the control of the conservator. The conservator may make order or direction in regulating the

limit or area within a forest reserve for the exercise of such rights including the mode of exercising thereof.

[48] Upon a close scrutiny and analysis of the Second Schedule, we find that except for the mode of taking the forest produce, the local limits within which the forest produce may be taken is absent. This is rather significant and has consequences in the context of the circumstances pertaining to the facts surrounding this case.

[49] What we can gather from the Second Schedule is that 'The Forest Reserve is constituted for the benefit of the permanent inhabitants' and the said Forest Reserve as defined in the First Schedule covers an area of 2,458 acres approximately at Bukit Bediri. There is nothing in the Second Schedule that defines the local limits within the 2,458 acres whereby the exercise of such rights are limited. Neither was there any order made by the DOF that was brought to the court's attention which regulates any local limit in respect to the exercise of such rights.

[50] This aspect is important because the question for the Federal Court's determination concerns areas other than the cleared land or *temuda*. It is within these primary uncleared forests that the exercise of rights for taking the forest produce as at para (a) and to hunt game and catch fish at para (b) are admitted.

[51] Hence, we are of the view that in the absence of any such limitation or order specifying a particular local limit within the Bukit Bediri Forest Reserve that the rights under paras (a) and (b) are exercisable by the plaintiffs over the *entire* Bukit Bediri Forest Reserve.

[52] In respect of other conditions subjecting the exercise of right to hunt game and catch fish to the laws on fishing and hunting, the prohibition of felling of new virgin forest and of planting of new rubber and pepper gardens, we are of the view that such conditions are crucial in achieving the object and purpose of the enactment of the Forests Ordinance 'to provide for the protection and management of the forests of the Colony, and to regulate the taking of forest produce'.

[53] It is only if the right holder fails for a continuous period exceeding three years to exercise any such right that the latter (the right) may be annulled permanently (s 15(c)).

[54] Otherwise, in the absence of any breach of the conditions attached to the admitted rights by the right holder, he is entitled to quiet and peaceful enjoyment of the rights as stipulated in the Second Schedule.

[55] Taken as a whole, the two forests were created for the benefit of the permanent residents of the longhouses in those two forest reserves. The fact that the two forests have conditions attached to their use for the benefit of the said permanent residents was a clear indicator, as provided by the State Legislature to the effect that they be controlled and maintained by the DOF, that the creation of a reserve forest did not result in the government losing all manner of control over the forest reserves.

[56] It is with that in the background that the issue of trespass ought to be viewed and appreciated.

TRESPASS

[57] We now proceed to consider the issue of whether the court below were justified in coming to the conclusion and findings that the third to fifth defendants were liable jointly and severally for the commission of the actionable tort of trespass against the plaintiffs. The tortious act in which the plaintiffs are claiming compensation for is the tort of trespass, an action which is actionable per se based on interference with the possession of land, not necessarily with the ownership of it (see generally the *Halsbury's Laws of Malaysia*; *Sin Heap Lee — Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515).

[58] This court has, in the case of *Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd* [2019] 1 MLJ 1 defined trespass in the following terms: 'Put simply, trespass onto land is the unlawful direct and immediate interference with the possession of land which is in the possession of another person, or which another person is entitled to possession of …'.

[59] It must be stated at the outset that the plaintiffs were in physical possession of the forest reserve where they have been living even before the constitution of the forest reserve by the state authority pursuant to the SFO 1934. Their right to sue for trespass therefore could not be denied. The defence erected by the defendants was not so much that the plaintiffs had no locus standi to sue, but rather that they were constructing the rail line pursuant to a written permission issued to them by the purported relevant state authority. The tortious act in which the plaintiffs are claiming compensation for is the tort of trespass. The act of trespass is a prohibition under s 21 of the SFO 1934, which is a provision that criminalises several acts, including trespass, from being conducted within the boundaries of a forest reserve.

[60] An act of trespass within a forest reserve is made an offence which is punishable under s 62 of the SFO 1934. The saving clause however is provided

under s 23 of the SFO 1934 which does not prohibit or render punishable the acts done in any of the following:

(a) the taking of forest produce in accordance with s 9 of the admitted rights (this covers those permanent inhabitants named in the Second Schedule); or

(b) the exercise of any right created by grant or contract in writing under s 18 (the contract in writing under s 18 must be made by the Governor and not the Director of Forestry); or

(c) any act done with the permission in writing of the Director of Forestry; or

(d) the taking of forest produce according to Part IV of the Ordinance.

[61] Taking into account the above provisions in its entirety, we found that the language employed under s 23, read together with ss 21 and 62 define the 'criminal' aspect dealt with under the SFO 1934.

[62] Having said that however, we are of the considered view that, even if there was such a permission in writing by the DOF, such permission would only be a legitimate defence if it is pertaining to a criminal prosecution for trespass. As provided above, the exceptions under s 23 of the SFO 1934 could well be used to exonerate one from criminal liability.

[63] As such, taken *alone*, without a corresponding change in the conditions pertaining to the rights of the plaintiffs to forage which covers the entire forest reserve at Bukit Bediri, that written permission could not, with respect, afford a ready defence against a claim for trespass in a civil action, such as the plaintiffs' present civil claim for trespass.

[64] Even if we consider that a contract in writing may be entered into with any company with respect to any act in the forest reserve under s 18 of Cap 31, that contract in writing must be made by the Governor, or, in the word of Cap 126, 'contract made by the Government.' The word used in both legislations is the 'Governor' and 'Government' and not by the 'Director'. There was nothing of that sort of evidence led before the HC in this case.

[65] The question posed for our determination in this appeal involves those primary uncleared forest within which rights are exercisable under paras (a) and (b) of the Second Schedule. From our reading of those paragraphs, these rights are of usufructuary and communal in nature. The right to forage is akin to a usufructuary right, a right under the Civil Law system where a person may benefit from the use of another's property for as long such use does not damage or change the character of the said property that is being used. An example would be to use another's river water to generate energy but the ownership of

the water itself is not impacted. The *Merriam Webster Dictionary* defines the term 'usufructuary right' as the legal right of using and enjoying the fruits or profits of something belonging to another. In this case, there was no dispute that the plaintiffs were in occupation of the forest reserve with certain rights to forage the forest produce within the entire area of the said Bukit Bediri Forest Reserve. The plaintiffs were at all material times, in legal occupation of the forest reserve. Vide the Second Schedule, among others, they were allowed subject to conditions, to forage even in the primary or virgin area of the forest reserve as long as they did not fell trees to create new *temuda.*

[66] Premised upon the above, as there was no condition imposed on the exercise of those rights of the plaintiffs as to local limits within which confines inside the forest reserve of Bukit Bediri, when the Second Schedule was published in the *Gazette* Notification No 760, the only reasonable inference to be gathered from such deliberate omission must be that the plaintiffs were uninhibited to exercise their rights anywhere within the demarcated area of the forest reserve. That inference becomes the more irresistible given the fact that when permission was purportedly given to the timber companies to construct a rail line traversing the forest reserve of Bukit Bediri and the Stika forest, no corresponding action was taken to notify the plaintiffs of the same, by way of amending the conditions as to the exercise of their rights in the Bukit Bediri Forest Reserve. In the absence of the above, the undisputed act of encroachment by the defendants was indeed a trespass upon the forest reserve, which was actionable at the instance of the plaintiffs. At this juncture, suffice it is for us to state there exists ample evidence upon which both the courts below had found as established, that the virgin jungle where the rail line was constructed had forest produce such as 'asam payak' and fish resources like catfish, which the plaintiffs could potentially forage in exercise of their rights as enumerated under the Second Schedule. Again, by way of reiteration, as long as the plaintiffs did nothing to not comply with the conditions on the exercise of their rights as enumerated in the Second Schedule, they were entitled to the quiet and peaceful enjoyment of their rights in the forest reserve of Bukit Bediri. The unsolicited encroachment by the defendants' construction of the rail line was clearly an act of trespass, for which the plaintiffs were entitled to damages as compensation, from the defendants.

CONCLUSION

[67] The state's entitlement to retain control over the forest reserve and its produce and things found therein is not to be determined by the existence or non-existence of the 'imposition of conditions' attached to the admitted rights in the Second Schedule of the *Gazette* Notification No 760. Such determination is to be assessed according to the provisions under s 12 of the SFO 1934 where the said Notification No 760 was made under.

[68] In so much as the state retains control, the nature and extent of such control relates only in so far as the protection and management of the forests and the regulation of the taking of forest produce is concerned, and not to the infringement of the admitted rights, communal and/or usufructuary rights exercisable within the areas of the forest reserve as provided for in the Second Schedule. Hence, the nature of control retained by the state is circumscribed in light of the rights admitted and conditions attached as enumerated in the Second Schedule of Notification No 760.

[69] In the absence of any local limits specified for the exercise of those admitted rights within the forest reserve, and as long as the plaintiffs do not breach any conditions attached, they are entitled to the quiet and peaceful enjoyment of their admitted rights within the entire forest reserve. Therefore, the construction of a rail line within the forest reserve by the timber company, without any valid corresponding steps taken by the state by way of altering the conditions as appear in the Second Schedule or limiting the exercise of the admitted rights, had amounted to a trespass.

[70] In essence therefore, this has been a case where the state having retained control over the forest reserve, had however failed to exercise such control within the scheme as stipulated under s 12(2) of the Forests Ordinance 1934. We think that the COA was it right when it stated as follows:

> [50] Further, apart from the fact that approval was given for the construction of the rail line, there is no other evidence adduced to show that pursuant to the approval, the Director of Forests had issued any direction or order that the exercise of the plaintiffs' subsisting rights be limited. In other words, there is no evidence to show that upon the issuance of the timber licence and/or the approval of the rail line, the rights of the seven longhouses and the 20 persons are subject to any other conditions imposed by the Director of Forests apart from the conditions already expressed in the Second Schedule of *Gazette* Notification No 760 (Per Tengku Maimun JCA (as she then was).

[71] Premised upon the above, we are of the unanimous and respectful view, that although the answer to the sole remaining question (iii) pertaining to the retention of control by the state is answered in the *affirmative*, meaning to say that the state did retain control despite attaching the conditions, nevertheless the facts, as established in this appeal, as they related to the issue of trespass, had shown clearly that the defendants had encroached upon the Bukit Bediri Forest reserve by constructing the rail line, albeit in the virgin jungle within the forest reserve, without the permission of the plaintiffs, expressly or otherwise. That had amounted to the actionable tort of trespass. The findings of the HC on this issue, and which were subsequently affirmed by the COA, had been findings which were supported by the evidence as adduced before it.

[72] We could not find any cogent reason as to why such concurrent findings of facts on trespass by both courts below ought to be disturbed by us. We agreed with the findings of facts made by the HCJ. She was entitled to come to her inferences and the fact that we may come to our own different inferences from her, is not in itself, a good and valid ground for us to disturb her various findings, which to our minds, were supported by the evidence. Of course there is a big caveat there, in that such an inference so reached must not be so perverse, that no reasonable person so circumstanced would have come to such conclusion in making such inference. Suffice for us to say here that we did not find the HCJ's findings to be perverse. Absent that perverse finding by the learned HCJ, her decision is entitled to its due deference from the appellate court (see generally *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyds Rep 403).

[73] Only in a case where it has been shown to the satisfaction of the appeal tribunal that the impugned decision has been one that is plainly wrong, would the appeal tribunal weigh in and invoke its appellate power in order to right a wrong decision in plain sight. The well entrenched principle on appellate intervention of a trial court's decision has been consistently applied by the appellate courts and was reiterated by the apex court in the case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441. In citing *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, the apex court also adverted to the case of *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785, where it was stated that 'a plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of the evidence'. The English House of Lords' decision in the case of *Watt (Or Thomas) v Thomas* [1947] 1 All ER 582; [1947] AC 484 was cited, inter alia, in support thereof. In fact, as relatively recently as in 2014, the English Supreme Court in *Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600 ('the *Henderson*'s case) considered and explained the 'plainly wrong' test as follows:

> 62. Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considered that it would have reached a different conclusion. *What matters is whether the decision under appeal is one that no reasonable judge could have reached.* (Emphasis added.)

[74] At the risk of being repetitive, we were not convinced that the courts

below had been plainly wrong in coming to their decision on these issues of control and trespass.

[75] In the upshot therefore, upon considering the submission and evidence on the narrow and limited latitude provided, pertaining to question (iii) only, we are of the considered view that the answer to that leave question (iii) must be in the *affirmative*. In other words, the state retained control in the Bukit Bediri Forest Reserve.

[76] We therefore *allow* this appeal *in part*. In light of the *TR Sandah* decision, the plaintiffs did not acquire any NCR in respect of the practices of *pulau galau* and the *pemakai menoa* in both forests. That part of the decision of the courts below is set aside.

[77] However, we *dismiss* the appeal of the third to fifth defendants in respect of the part of the decisions of the courts below that had entered judgment against them, jointly and severally, for having committed the tort of trespass. We hereby *affirm* that part of the decision of the COA which had affirmed the same order by the HCJ. The assessment of damages shall be heard before another HCJ of the High Court of Sabah and Sarawak sitting at Kuching.

[78] As to costs, each party to bear own costs. Order accordingly.

[79] Mention date to fix the hearing date for the assessment of damages shall be within 14 days from today.

Order accordingly.

Reported by Ashok Kumar